THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-000735
Trial Court Case No. 2017-CP-26-2910

Kenneth A. Davis as Personal Representative
of the Estate of Kenneth Miles Davis, Respondent,

v.

Cole Austin Dunn and John Richard Smith, Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On May 9, 2017, Respondent Kenneth A. Davis ("Respondent"), as the Personal Representative of the Estate of his son, Kenneth Miles Davis ("Decedent"), filed a Summons and Complaint against Defendants Cole Austin Dunn ("Dunn") and John Richard Smith ("Mr. Smith") (collectively referred to as "Appellants"). Respondent asserted a claim for negligence against Dunn and claims for negligent supervision and negligent entrustment against Mr. Smith relating to the shooting death of Decedent, who was sixteen years old at the time he was shot. Decedent was killed when he was shot in the head at point blank range by Dunn, who was engaged in reckless horseplay with his 12-gauge shotgun that Dunn mistakenly thought was unloaded at the time. Dunn, who was seventeen years old at the time of the shooting, was given the shotgun by Mr. Smith, his step-father.

On June 23, 2017, Appellants filed a responsive pleading styled as an Answer and Counterclaims, which included a Motion to Dismiss the Complaint with prejudice, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Answer and Counterclaims included the following laundry list of defenses, which included numerous non-existent, inapplicable and/or legally obsolete defenses: Open and Obvious Danger; Comparative Negligence; Assumption of the Risk/Sole Negligence; Accord and Satisfaction, Release, Settlement, Payment, Waiver, Joint Tortfeasors, and in the alternative, Reformation of Agreement; Setoff; "Tyger River;" Bad Faith; Unclean Hands; Lack of Standing; Equitable Powers of the Court; Res Judicata; Collateral Estoppel; Public Policy; Equitable Estoppel; Reservation of Right to Amend; and, Unconstitutionality of Punitive Damages. In this same pleading, Appellants asserted counterclaims against Decedent's Estate for alleged Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Breach of the Covenant of Good Faith and Fair Dealing, and alleged "Rule 11 Violation(s) and Motion to Dismiss/Strike."

On July 24, 2017, Respondent filed a Motion to Dismiss Counterclaims. In response, Appellants filed a "Notice of Motion and Motion to Dismiss and/or To Reform," along with a "Memorandum Supporting Defendants' Motion to Dismiss and/or To Reform and Opposing Plaintiff's Motion to Dismiss," in which Appellants sought relief pursuant to Rules 12(b)(6) and 56, SCRCP, on the alleged grounds: (i) that Appellants had been relieved of all personal liability; (ii) that Dunn should be dismissed from the case on the grounds that there is no justiciable controversy as to Dunn, and that Dunn is a sham party who should be dismissed from this action; (iii) that the Covenant Not To Execute granted to Charlotte Smith and Dunn and Order Approving a Wrongful Death Settlement released all members of the Smith household, or, in the alternative, that the Covenant Not to Execute should be reformed to explicitly release and relieve all members of the Smith household; and (iv) that Respondent and his counsel had acted in bad faith and that Defendants/Appellants are entitled to an award of sanctions, including attorney's fees, and the dismissal of the Complaint, in its entirety, with prejudice. On September 7, 2017, Respondent filed a Memorandum in Opposition to Appellants' Motion to Dismiss Complaint, Motion to Dismiss Dunn as a Party, and Motion to Reform Covenant Not to Execute. Notably, after Appellants submitted matters outside of the pleadings, Appellants did not request a continuance or request to be allowed to conduct discovery before any of the converted motions were heard.

The Honorable Larry B. Hyman, Jr. heard oral arguments on the pending Motions on September 12, 2017. As both Appellants and Respondent filed supporting and opposing memoranda that included exhibits and evidence outside of the pleadings, without objection, the pending motions to dismiss were converted into motions for summary judgment. The lower court instructed counsel for Respondent to prepare a proposed Order reflecting the rulings made by the lower court during the hearing and to submit the proposed Order to Judge Hyman's law clerk.

On September 13, 2017, the lower court issued a Form 4 Judgment in a Civil Case, which indicated that a formal order would follow. On April 9, 2018, the lower court issued a formal order granting Respondent's converted motion for summary judgment as to Appellants' counterclaims and denying Appellants' converted motions for summary judgment seeking to dismiss the Complaint, seeking to dismiss Dunn as a party, and seeking reformation of the Covenant Not to Execute. On April 20, 2018, Appellants filed their Notice of Appeal in the Court of Common Pleas for Horry County. This appeal followed.

STATEMENT OF FACTS

This case arises from the tragic death of sixteen-year-old Kenneth Miles Davis ("Decedent"). On October 9, 2016, Dunn and Decedent were socializing on the property where Decedent lived with his parents. (R. p. 27)[1]. Dunn was in possession of a loaded 12-gauge shotgun and was waving it around in a reckless manner before accidentally activated the trigger and shot Decedent in the face at point blank range. Decedent was transported to Conway Medical Center where he was pronounced dead. (R. pp. 27-28).

At all times relevant to the Complaint, Dunn lived with his mother, Charlotte Smith ("Ms. Charlotte Smith") at 2340 Highway 1115, Galivants Ferry, South Carolina ("Smith Residence"). Ms. Charlotte Smith obtained homeowners' insurance on the Smith Residence through South Carolina Farm Bureau Insurance Company ("Farm Bureau"). Ms. Charlotte Smith was the only named insured listed upon the declarations page of the Farm Bureau policy. (R. p. 223).

[1] Appellants take issue with the fact that the trial court's Order omitted any reference to Seth Sarvis, another friend of Decedent and Dunn was present on the property where Decedent lived with his parents. As no affidavit or testimony from Seth Sarvis was presented in the record below, the presence of Seth Sarvis when Dunn shot Decedent is immaterial to the motions that were before the lower court.

Decedent's father, Mr. Davis, was appointed as the Personal Representative of Decedent's estate. Respondent retained J. Taylor Powell, Esq., and the firm of Lesemann & Associates LLC to pursue claims for wrongful death and survival damages on behalf of the Estate. Prior to the filing of this action, Mr. Powell sent a "Tyger River" demand letter to Farm Bureau on January 30, 2017, in which he indicated that Respondent would grant a Covenant Not to Execute upon any judgment that Respondent may obtain against Dunn or Ms. Charlotte Smith in exchange for Farm Bureau paying policy limits of $300,000.00 in liability coverage and $5,000.00 in medical payment coverage under the Farm Bureau policy. (R. pp. 63-66).

A. Drafting of the Covenant Not to Execute

On January 31, 2017, Farm Bureau sent a letter to Mr. Powell confirming that Farm Bureau had accepted Respondent's demand and would pay its policy limits in exchange for a Covenant Not to Execute ("Covenant"). Farm Bureau also indicated that it would be hiring J. Dwight Hudson, Esq., as its local counsel to draft the Covenant Not to Execute. Mr. Hudson is counsel of record for Appellants. Appellants, in their brief, misrepresent the content of email exchanges between Respondent's counsel, Mr. Powell, and Appellants' counsel, Mary Anne Graham, by stating that Mr. Powell was in a hurry and was acting with a sense of urgency, that he began pushing for a "quick" approval, and that Mr. Powell stated that he could get a "fast" hearing. The words quick, fast, urgent, or hurry do not appear anywhere in the body of any emails between Mr. Powell and Ms. Graham.

On March 15, 2017, Respondent and his counsel signed the Covenant drafted by counsel for Appellants. (R. pp. 58-61). After the Covenant was signed, the lower court conducted a settlement approval hearing. The lower court reviewed the Petition for Approval of a Wrongful Death Settlement and conducted an inquiry to ensure the propriety of the proposed settlement in accordance with S.C. Code §15-51-42. The proposed settlement was approved, and the lower

court signed an Order Approving Wrongful Death Settlement, which was filed March 28, 2017. (R. pp. 773-776).

In the Initial Brief of Appellants, Appellants state that the Order Approving Wrongful Death Settlement allowed Respondent to pursue and collect on any additional liability policies. However, this assertion is contrary to the language of the Order Approving Wrongful Death Settlement. The Order states that Respondent's rights to pursue any other available coverage or source of payment are preserved.

Contrary to Appellants' assertions, the Covenant, as drafted and signed, did not include a release of any party and specifically provided that it did "not constitute a release of any claim or of any party." As indicated in Paragraph 11, the Covenant confirms that it is "NOT a release." Rather, the Covenant is merely a "covenant not to execute" upon any judgment obtained:

> Payees further understand and agree that this instrument is NOT a release, discharge, or accord and satisfaction and is only as a Covenant Not To Execute any judgment against Payors, their heirs, executors, administrators, legal representatives, successors, and assigns and is executed simply for Payors to purchase freedom from the threat of execution upon any judgment that may be obtained against them after payment of $305,000.00 under the Policy.

(R. p. 60). Additionally, Paragraph 12 of the Covenant states that the Covenant does not diminish Payee's rights to recover from any other source, such as Mr. Smith with regard to his specific negligence that led or contributed to the wrongful death of the Decedent:

> **This Covenant Not To Execute is not intended to and DOES NOT diminish, impair or limit Payee's rights, if any, to recover additional funds from other insurance coverage or from any other source for the Claim.**

(R. pp. 60-61) (emphasis in original). Mr. Smith is an example of another source, as Respondent believes and has duly alleged in the Complaint that Mr. Smith engaged in negligent acts that were a cause of Decedent's death.

The Covenant confirmed that it merely provided Payors with "freedom from the threat of

execution upon any judgment that may be obtained against them." The Payors, as specifically named and defined in the Covenant, are Dunn, Ms. Charlotte Smith, and Farm Bureau. Paragraph 7 of the Covenant includes an "integration clause" confirming that it represents the entire agreement between Respondent and the Payors:

> Payees declare and represent that Payors have made no promises, inducement, or agreement not expressed herein, *that this Covenant contains the entire agreement between the Payees and the Payors*, that the terms of this Covenant are contractual and not merely recital, and that Payors have made no representations as to the possibility of the recovery of any monies by Payees from any other source or policy for the claim.

(R. p. 59) (emphasis added). Contrary to Appellants' arguments on appeal, Mr. Smith is not a named insured nor is he a party to the Covenant.

B. Wrongful Death Proceeding

On May 9, 2017, Respondent filed a Summons and Complaint against Appellants. Ms. Charlotte Smith was not named as a party. As alleged in the Complaint, Appellants' negligence was the proximate cause of Decedent's death as a result of a fatal gunshot wound to Decedent's head. Mr. Smith negligently entrusted the gun to Dunn. Dunn negligently brandished and discharged the gun.

After Appellants were served with the Complaint, Mr. Hudson reached out to Respondent's counsel to inquire as to what other insurance coverage had been located, and to confirm who would be appearing on behalf of, and defending, Appellants. Respondent's counsel sent Mr. Hudson a letter dated June 7, 2017, explaining the present status of the action, so that Mr. Hudson could best advise his clients and Farm Bureau. Appellants, in their brief, incorrectly state that in his June 7, 2017 letter, Respondent's counsel admitted that his actions were part of a "scheme to extort or coerce" Farm Bureau to pay its policy limits a second time. Mr. Hudson repeatedly defamed Respondent and Respondent's counsel in the proceedings before the lower

court, before making the alarming representation to this tribunal that the lower court engaged in "prejudicial favoritism" towards Respondent's counsel.

On June 12, 2017, Mr. Hudson sent Respondent's counsel a letter in which he again falsely accused Respondent's counsel of deliberately concocting a scheme to attempt to extort an additional policy limit from Farm Bureau and demanding that Respondent dismiss the Complaint. By letter dated June 13, 2017, Respondent's counsel informed Appellants' counsel that Respondent would not withdraw the Complaint against Appellants. The filing of the wrongful death action was explicitly addressed in the Covenant, which constituted a mere covenant not to execute on any judgment obtained against Ms. Charlotte Smith or Dunn.

On June 23, 2017, Appellants filed their Answer and Counterclaims against Respondent. Thereafter, Appellants filed their motions. On July 24, 2017, Respondent filed a Motion to Dismiss Appellants' Counterclaims. Both Respondent[2] and Appellants[3] filed supporting and opposing memoranda, which included evidence outside of the pleadings without objection. The trial court heard oral arguments on September 12, 2017.

After considering all filings, evidence, and arguments of counsel at the hearing, the lower court issued its formal Order on April 9, 2018. Appellants argue that the trial court's Order held that Farm Bureau had a duty to answer and defend Respondent's Summons and Complaint

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[2] Items which Respondent's counsel presented without objection in support of or in opposition to the pending motions included: (1) the Farm Bureau policy declarations page and Homeowner's Insurance Policy; (2) the January 30, 2017 Tyger River Demand Letter to Farm Bureau; (3) Farm Bureau's January 31, 2017 letter; and (4) the Covenant.

[3] Items which Appellants' counsel presented in support of or in opposition to the pending motions included: (1) Counsel for Respondent's June 7, 2017 letter; (3) Counsel for Appellants' June 12, 2017 letter; (4) Counsel for Respondent's June 13, 2017 letter; (5) Counsel for Respondent's February 9, 2017 email; (6) Affidavit of John Richard Smith; and (7) Affidavit of Cole Austin Dunn.

against Appellants. As evidenced by the Order and hearing transcript, the trial court made no such finding or conclusion. Appellants also argue that the trial court's Order holds that a carrier owes a separate policy limit to each insured. The trial court's Order does not contain any language to this effect. In fact, the trial court asked Appellants' counsel why Farm Bureau was defending the action is it paid all of the coverage available under its policy. (R. p. 489, lines 12-16). The trial court went on to state that Farm Bureau may not have any other obligation, but that the question before the trial court was whether or not Respondent can bring an action against Mr. Smith. (R. p. 496, lines 9-12).

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. *Companion Property and Casualty Ins. Co. v. Airborne Express, Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006), citing *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id. See also, Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998) (In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party); *Companion Property*, 369 S.C. at 390-391, 631 S.E.2d at 916 ([appellate court's] standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom).

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' COUNTERCLAIMS

As discussed more fully below, the only immediately appealable portion of the Order relates to the summary judgment granted in favor of Respondent on Appellants' counterclaims for breach of contract, breach of contract accompanying a fraudulent act, breach of the implied covenant of good faith and fair dealing, and the purported claim for Rule 11, SCRCP, sanctions.

A. No Actual Breach of a Contract is Alleged.

The only contractual document involving Respondent is the Covenant given by Respondent, as Payee, and Cole Austin Dunn, Charlotte Smith, and South Carolina Farm Bureau Mutual Insurance Company, as Payors. Appellants failed to identify a specific provision in the Covenant that Respondent allegedly breached. In order to state a claim for breach of contract or breach of contract accompanied by fraudulent act, Appellants must present competent allegations regarding each of the following elements: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered as a direct result of the breach. *See Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

B. The Plain Terms of the Covenant Preclude the Counterclaims.

The Covenant, which was drafted by Appellants' counsel in this case with limited input from counsel for Respondent, contains multiple provisions that precluded Appellants' counterclaims. First, Paragraph 7 of the Covenant includes an integration clause confirming that it represents the "entire agreement" between Respondent and the Payors, which precludes any assertion that any agreement existed other then the only one that in fact existed. (R. p. 59). Additionally, Paragraph 11 of the Covenant confirms that the Covenant is "NOT a release," which prohibits (but has failed to deter) Appellants from claiming that the Covenant is a release. (R. p.

60). Finally, Paragraph 12 of the Covenant states that the Covenant does not diminish Payee's rights to recover from "any other source," such as Mr. Smith in light of his specific negligence that led to the wrongful death of the Decedent. (R. pp. 60-61). These provisions are unambiguous and entitled Respondent to judgment as a matter of law on the purported counterclaims.

i. The Covenant is "NOT a Release."

Appellants and their counsel attempt to refer to the Covenant as a "Release," even though Appellants and their counsel are aware that the Covenant is "NOT a release." This is what the incontrovertible terms of the document state. The above-cited provisions of the Covenant could not be more clear that Respondent was reserving the right to pursue claims and agreed only to not execute on any judgment against Payors Cole Austin Dunn and Charlotte Smith.

ii. All Parties, as set forth in the Covenant, Anticipated the Filing of this Suit.

Appellants allege that Respondent breached the terms of the Covenant by filing the lawsuit. This allegation is quickly dispelled by reading Paragraph 13 of the Covenant, which specifically states:

> It is understood that the Personal Representatives of the Estate of Kenneth Miles Davis may file suit regarding this Claim. This Covenant Not To Execute is not intended to limit or impair the right of the Personal Representatives to file suit.

(R. p. 61) (emphasis added). Based on the plain terms of the contractual document, it is not possible for Appellants to state a claim for breach of contract or breach of contract accompanied by a fraudulent act when Respondent has done exactly what the Covenant contemplated and allowed him to do, which was to file suit relating to the wrongful death of his son, the Decedent. Parties enter into a covenant not to execute when it is contemplated that suit will be filed and is likely to include one or more payors as defendants. It is impossible for Appellants to establish a breach of contract against Respondent by virtue of filing the action.

iii. There Are No Competent Allegations of Fraudulent Intent or Fraudulent Act Accompanying the Non-Existent Alleged Breach of Contract.

As the record demonstrates, the lower court properly found that Appellants failed to present well-pled allegations of any fraudulent intent or fraudulent act that accompanied any breach of contract, rendering the counterclaim for breach of contract accompanied by fraudulent act subject to immediate dismissal. To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *See RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct. App. 2004), citing *Conner v. City of Forest Acres,* 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). As any allegation involving fraud must be pled with particularity, under Rule 9(b) of the South Carolina Rules of Civil Procedure, the lack of any concrete allegations must result in dismissal.

iv. Merely Doing What a Contract Allows to Be Done is Not Actionable as a Breach of the Implied Covenant of Good Faith and Fair Dealing.

The lower court properly held that Appellants' counterclaim for breach of the covenant of good faith and fair dealing against Respondent also fails as a matter of law because such a claim does not arise when the party alleged to be in breach merely did what the contract allowed him to do, which in this case is to file suit and seek a recovery. Under well-settled law in South Carolina, "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995), *citing First Federal Savings and Loan Ass'n. of South Carolina v. Dangerfield,* 307 S.C. 260, 414 S.E.2d 590 (Ct. App. 1992).

v. There is No "Common Law" Duty of Good Faith and Fair Dealing.

Contrary to Appellants' assertions, there exists no common law duty of good faith and fair dealing between Respondent and Appellants. Specifically, there is no independent cause of action relating to the implied covenant of good faith and fair dealing under South Carolina law. *See, e.g., RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 472, 597 S.E.2d 881, 884 (2004) (the implied covenant of good faith and fair dealing does not constitute a standalone cause of action separate from breach of contract). Because Appellants' counterclaim for breach of contract fails as a matter of law, the lower court properly concluded that the counterclaim for breach of the implied covenant of good faith and fair dealing must also fail as a matter of law.

C. Mr. Smith Cannot Assert Any Contract-Based Counterclaims.

As an additional matter, Mr. Smith is not a party to the Covenant. Therefore, he cannot assert a contract-based counterclaim of any kind, whether for breach of contract (including alleged breach of the covenant of good faith and fair dealing) or breach of contract accompanied by fraudulent act.

D. "Rule 11 Sanctions" is Not a Cause of Action.

Appellants' purported counterclaim relating to Rule 11 violations was properly dismissed. In relevant part, Rule 11 of the South Carolina Rules of Civil Procedure requires that every pleading of a party represented by an attorney shall be signed by at least one attorney who is admitted to practice law in South Carolina, and that the signature of such an attorney constitutes a certificate by him that he has read the pleading and that to the best of his knowledge that there is good ground to support it, and that it is not interposed for delay. The filing of the Complaint to seek damages for the wrongful death of Decedent is not sanctionable. In fact, the poorly conceived counterclaims asserted by Appellants, which are undermined by the plain wording of the Covenant itself, are the only potential violation of Rule 11 that has occurred here. In any event, any violation of Rule 11, whether real or imagined, is addressed by motion, not by counterclaim. As such, there

is no cause of action for "Rule 11 sanctions." Judgment in favor of Respondent was proper.

II. THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTIONS FOR SUMMARY JUDGMENT IS NOT APPEALABLE

Appellants raise issues on appeal relating to the denial of Appellants' converted motions for summary judgment to dismiss the Complaint, to dismiss Dunn from the case, and to reform the Covenant. The denial of Appellants' motions is not appealable. An order denying a motion for summary judgment is not appealable. *See Olsen v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003); *see also Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 691 S.E.2d 473 (2010) (noting it is well-settled that an order denying summary judgment is never reviewable on appeal). *In re Rabens*, 386 S.C. 469, 688 S.E.2d 602 (Ct. App. 2010) ("A denial of summary judgment does not establish the law of the case and is not directly appealable."); *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). The denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense, since the defense may be raised again later in the proceedings. *Ballenger v. Bowen*, 313 S.C. 476, 433 S.E.2d 379 (1994).

The denial of a motion for summary judgment is not reviewable even after a trial of the case on its merits. *Raino v. Goodyear Tire & Rubber Co.*, 309 S.C. 255, 422 S.E.2d 98 (1992); *see also AJG Holdings L.L.C. v. Dunn*, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011) (noting the *Olsen* Court unequivocally held that the denial of summary judgment is never subject to review, whether through an interlocutory appeal, or after final judgment); *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) (declining to consider the denial of a motion for summary judgment, even though another appealable issue existed). Even if considered by this Court, the trial court's denial of Appellants' motions for summary judgment was proper in light of the record and the unambiguous nature of the Covenant.

A. Even if the Denial of Appellants' Motion for Summary Judgment were directly Appealable, the Trial Court Did Not Err.

The trial court was correct in finding that Mr. Smith was not a "named insured" under the Farm Bureau policy at issue, and thus was not protected by the Covenant. Absent ambiguity, in South Carolina the language of an insurance policy is given its plain, ordinary, and popular meaning. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 637, 594 S.E.2d 455, 458 (2004). Where a term is not defined in a policy, it is to be "defined according to the usual understanding of the term's significance to the ordinary person." *Ex parte United Servs. Auto. Ass'n*, 365 S.C. 50, 55, 614 S.E.2d 652, 654 (Ct. App. 2005). The term "named insured" is not a defined term anywhere in Farm Bureau's policy and only Ms. Charlotte Smith is identified as a "named insured" within the policy. The trial court properly rejected Appellants' argument that Mr. Smith was "basically a named insured" under the policy. (R. p. 490, line 23-p. 491, line 1).

Therefore, the trial court correctly denied Appellants' converted motion for summary judgment based on its finding that the only named insured as it relates to the Farm Bureau policy at issue is Ms. Charlotte Smith.

B. Although Not Immediately Appealable, the Denial of Appellants' Motion for Summary Judgment as to Dunn was Proper.

The trial court's denial of Appellants' motion for summary judgment to dismiss Dunn decides nothing about the merits of the case against Dunn and therefore, is not directly appealable to this Court. However, to the extent the Court decides to review this issue, the record supports the trial court's finding that the availability of any insurance coverage from which Respondent could collect upon any judgment obtained against Dunn has no bearing on his viability as a party in the wrongful death action. Respondent's Complaint pleads facts which, when viewed in a light most favorably to Respondent, support a cause of action against Dunn. The mere fact that Respondent has agreed not to execute upon a judgment against Dunn does not affect Respondent's fundamental

right to assert a claim for negligence against Dunn in connection with the wrongful death of Decedent.

C. Denial of Appellants' Motion for Summary Judgment as to Reformation was Proper.

The trial court properly denied Appellants' motion for summary judgment to reform the Covenant to include Mr. Smith as a party. A court of equity may reform a contract where the mistake is not mutual but unilateral and has been induced by the fraud, deceit, misrepresentation, concealment or imposition in any form of the party opposed in interest to the reformation without negligence on the part of the party claiming the right. *See, e.g., Shaw v. Aetna Cas. & Sur. Ins. Co.*, 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980). Appellants' claim that their failure to include Mr. Smith as a party to the Covenant was somehow induced by Respondent and his counsel is wholly unsupported by the facts. The trial court was correct in finding that there was no basis for reforming the Covenant on the basis of mutual mistake or unilateral mistake, and properly denied Appellants' motion for summary judgment on this issue. Accordingly, the Court should reject Appellants' attempt to seek appellate review of this issue.

III. NO JUSTICIABLE CONTROVERSY EXISTS AS TO WHETHER FARM BUREAU'S ACTIONS WOULD CONSTITUTE BAD FAITH

Appellants' allegations of an attempt by Respondent and his counsel to "create an illusory bad faith situation" fails to present an appealable issue for this Court's review. "This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation."). The appellate courts possess the inherent authority to consider questions of justiciability. *See James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010).

The lower court did not rule, and was not asked to rule, on any claim or counterclaim for bad faith, whether actual or illusory.

Farm Bureau is not a party to this action. Respondent has not asserted any claim against Farm Bureau for bad faith in its handling of any claims. Appellants have not sought a declaration from the lower court relating to the Policy or Covenant. Respondent's counsel has stated that **if** a judgment is obtained against Mr. Smith, and no other available insurance coverage or assets are available to satisfy such a judgment, then Respondent would likely seek to have Mr. Smith assign his right to bring a first party cause of action against Farm Bureau to Respondent. Whether Respondent is able to seek such an assignment from Mr. Smith is wholly contingent on Respondent obtaining a judgment against Mr. Smith. Furthermore, as no discovery has been conducted in this litigation, Appellants' arguments are based upon assumptions that are not supported by the record.

Appellants' attempt to seek judicial intervention relating to a hypothetical "bad faith situation" to a non-party to the action should be denied.

IV. NO ISSUES WERE ACTUALLY LITIGATED IN THE WRONGFUL DEATH SETTLEMENT APPROVAL HEARING AND THEREFORE, THE ORDER APPROVING WRONGFUL DEATH SETTLEMENT IS NOT A FINAL JUDGMENT ON THE MERITS

Appellants argue that Respondent should be estopped from filing the wrongful death action against Appellants on the alleged basis that Respondent falsely invoked Tyger River without intending that it would protect Appellants from being named as defendants in the wrongful death action. This argument is without merit.

A. Appellants Cannot Invoke the Doctrine of Equitable Estoppel.

Appellants argue that the lower court erred in finding that Appellants' claim for equitable estoppel is without merit. As discussed above, the denial of Appellants' converted motion for summary judgment is not appealable. *See Olsen v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003). However, even if considered by this Court, the lower court properly found that summary judgment was not warranted on the basis of equitable estoppel. (R. pp. 13-16).

Equitable estoppel cannot be used to alter the terms of an unambiguous, written contract. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 600, 799 S.E.2d 912, 916 (2017). The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts by the party. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party to be estopped; and (3) a prejudicial change of position in reliance on the conduct of the party to be estopped. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916–17 (2017). A "party to an unambiguous contract cannot prove lack of knowledge or the means of acquiring knowledge of the contract's meaning, which bars an equitable estoppel claim in the first instance." *Id.* at 604, 799 S.E.2d at 918. Dunn, as a party to the Covenant, is precluded from asserting a claim for equitable estoppel.

It is clear from the record that Respondent made no representations of any kind to Mr. Smith prior to filing suit. There was no contact between Respondent, or Respondent's counsel, and Mr. Smith regarding the Farm Bureau policy, the Tyger River demand, the response from Farm Bureau, the preparation or execution of the Covenant, the Order Approving Wrongful Death

Settlement. Furthermore, there is no allegation that Mr. Smith took any action, or refrained from taking any action, on the basis of any conduct by Respondent. As a result, the lower court properly found that Mr. Smith was not entitled to invoke the defensive doctrine of equitable estoppel.

B. Judicial Estoppel Does Not Apply to Bar the Wrongful Death Action Against Appellants.

Appellants' argument relating to the doctrine of judicial estoppel is without merit. For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013). There is nothing in the record that demonstrates two "totally inconsistent" positions taken by Respondent.

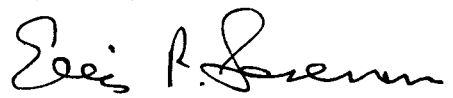
As the lower court correctly found, estoppel does apply to bar the filing of this action because the settlement approval hearing was merely a statutory requirement as stated in S.C. Code § 15-51-41. It was not a proceeding on the merits, which would have been a contested matter. There was no trial on the merits of the case, but merely rather the approval of a settlement that itself specifically contemplated and authorized future litigation relating to the underlying events. No issues were litigated or directly determined in the settlement approval hearing. The settlement approval hearing did not result in a final judgment on the merits, nor are the parties to that settlement approval identical to the present action or in privity. Furthermore, the prior settlement approval hearing involved the identical subject matter as the present action, as it involved the approval of a settlement as opposed to the adjudication of a contested claim. No party or entity has

been sued twice after having been involved in a prior action that was heard and decided on the merits in connection with the wrongful death of Decedent. For these reasons, judicial estoppel is inapplicable and does not warrant reversal.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's order and remand this matter to allow for Respondent's claims to proceed.

Respectfully submitted,

By: 

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November 30, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-000735
Trial Court Case No. 2017-CP-26-2910

Kenneth A. Davis as Personal Representative
of the Estate of Kenneth Miles Davis, Respondent,

v.

Cole Austin Dunn and John Richard Smith, Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondent's Final Brief complies with Rule 211(b), SCACR.

By: _____

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